Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES

DALE McALARY AND PEARL McALARY,
Petitioners,
vs.
STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES; HOWARD HENDRICK, Director of Oklahoma Department of Human Services; OKLAHOMA HEALTH CARE AUTHORITY; MIKE FOGARTY, Director of Oklahoma Health Care Authority; HOWARD HENDRICK, individually; and GERRY MOORE, individually,
Respondents.

On Petition for Certiorari to the Court of Civil Appeals to the State of Oklahoma, Division No. 2

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a Trust created for the benefit of the Plaintiffs by their daughter is an "available resource" for Plaintiffs in determinations of their eligibility for Medicaid benefits?

List of Parties

(1) DALE McALARY, Plaintiff and Petitioner;

(2) PEARL McALARY, Plaintiff and Petitioner;

(3) STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES, Defendant and Respondent;

(4) HOWARD HENDRICK, Director of the Oklahoma Department of Human Services and Individually, Defendant and Respondent;

(5) OKLAHOMA HEALTH CARE AUTHORITY, Defendant and Respondent;

(6) MIKE FOGARTY, Director of Oklahoma Health Care Authority, Defendant and Respondent;

(7) GERRY MOORE, Individually, Defendant and Respondent

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OPINIONS BELOW

The order of the Oklahoma Supreme Court denying the Petition for Writ of Certiorari, was filed March 29, 2010.

The opinion of the Court of Civil Appeals of the State of Oklahoma, Division 2, filed December 31, 2009, and reversing the Order of the District Court of Dewey County, State of Oklahoma, is reported at *McAlary v. State of Oklahoma, et al.*, 2010 OK CIV APP 39, 2009 Okla. Civ. App. LEXIS 147. The opinion is reprinted in the Appendix hereto, pp. A-1.

The order of the District Court of Dewey County, State of Oklahoma, granting Petitioners' Motion for Partial Summary Judgment and finding Mr. and Mrs. McAlary eligible for Medicaid, filed September 18, 2008, is reprinted in the Appendix hereto, pp. A-18.

The opinion of Howard Hendrick, Director of the Oklahoma Department of Human Services, upon reviewing the decision from the administrative hearing, and denying Medicaid eligibility to Mr. and Mrs. McAlary, is dated July 18, 2008, and is reprinted in the Appendix hereto, pp. A-21.

The Decision of the Administrative Hearing Officer, denying Medicaid eligibility to Mr. and Mrs. McAlary, and dated June 19, 2008, is reprinted in the Appendix hereto, pp. A-31.

The Notice of Denial from the Dewey County, Oklahoma Department of Human Services to Dale McAlary, denying his eligibility for Medicaid, and issued March 25, 2008, is reprinted in the Appendix hereto, pp. A-38.

The Notice of Denial from the Dewey County, Oklahoma Department of Human Services to Dale McAlary, denying his eligibility for Medicaid, and issued March 24, 2008, is reprinted in the Appendix hereto, pp. A-39.

The Notice of Denial from the Oklahoma Department of Human Services to Dale and Pearl McAlary, denying their eligibility for Medicaid, and issued March 18, 2008, is reprinted in the Appendix hereto, pp. A-40.

JURISDICTION

On March 25, 2008, Petitioners brought suit against the Respondents in the District Court of Dewey County, State of Oklahoma, alleging violations of administrative procedures, violations of state and federal Medicaid laws, and abuse of process, discretion and/or power. Petitioners sought both permanent and temporary injunctions, as well as fees and costs. Petitioners had previously exhausted their administrative remedies with the Oklahoma Department of Human Services, which denied Mr. and Mrs. McAlary's Medicaid eligibility. The Dewey County District Court granted Petitioners' Motion for Partial Summary Judgment, finding Mr. and Mrs. McAlary eligible for Medicaid benefits. See App., pp. A-22.

Respondents appealed the ruling. On December 31, 2009, the Court of Civil Appeals, State of Oklahoma, Division Two, issued an opinion reversing the decision of the Dewey County District Court and finding the decision of the Oklahoma Department of Human Services denying Mr. and Mrs. McAlary's Medicaid eligibility to be still in effect. See App., pp. A-20.

On March 29, 2010, the Oklahoma Supreme Court denied the Petition for Writ of Certiorari filed by Petitioners.

The jurisdiction of this Court to review the Order of the Court of Civil Appeals is invoked under 42 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

42 U.S.C. §§1396p(d)(2) and 1396p(d)(3)

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(d) Treatment of trust amounts.

(2) (A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3) (A) In the case of a revocable trust—

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the

individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

42 U.S.C. §1396a(a)(17)(B)

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must—
(17) except as provided in subsections (e)(14), (l)(3), (m)(3), and (m)(4), include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq., or 601 et seq.], and with respect to whom supplemental security income benefits are not being paid under title XVI [42 USCS §§ 1381 et seq.], based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title [42 USCS §§ 1396 et seq.], (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or

recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq., or 601 et seq.], or to have paid with respect to him supplemental security income benefits under title XVI [42 USCS §§ 1381 et seq.]) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under 21 or (with respect to States eligible to participate in the State program established under title XVI [42 USCS §§ 1381 et seq.]), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1614 [42 USCS § 1382c] (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums, payments made to the State under section 1903(f)(2)(B) [42 USCS § 1396b(f)(2)(B)], or otherwise and regardless of whether such costs are reimbursed under another public program of the State or political subdivision thereof)

incurred for medical care or for any other type of remedial care recognized under State law;

20 C.F.R. §416.1201(a)

20 C.F.R. § 416.1201 Resources; general.

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

(2) Support and maintenance assistance not counted as income under § 416.1157(c) will not be considered a resource.

(3) Except for cash reimbursement of medical or social services expenses already paid for by the individual, cash received for medical or social services that is not income under § 416.1103(a) or (b), or a retroactive cash payment which is income that is excluded from deeming under § 416.1161(a)(16), is not a resource for the calendar month following the month of its receipt. However, cash retained until the first moment of the second calendar month following its receipt is a resource at that time.

(i) For purposes of this provision, a retroactive cash payment is one that is paid after the month in which it was due.

(ii) This provision applies only to the unspent portion of those cash payments identified in this paragraph (a)(3). Once the cash from such payments is spent, this provision does not apply to items purchased with the money, even if the period described above has not expired.

(iii) Unspent money from those cash payments identified in this paragraph (a)(3) must be identifiable from other resources for this provision to apply. The money may be commingled with other funds, but if this is done in such a fashion that an amount from such payments can no longer be separately identified, that amount will count toward the resource limit described in § 416.1205.

(4) Death benefits, including gifts and inheritances, received by an individual, to the extent that they are not income in accordance with paragraphs (e) and (g) of § 416.1121 because they are to be spent on costs resulting from the last illness and burial of the deceased, are not resources for the calendar month following the month of receipt. However, such death benefits retained until the first moment of the second calendar month following their receipt are resources at that time.

OAC 317:35-5-41(a) and 317:35-5-41(b)

317:35-5-41: Determination of
capital resources for individuals
categorically related to aged, blind and disabled

(a) General. The term capital resources is a general term representing any form of real and/or personal property which has an available money value. All available capital resources, except those required to be disregarded by law or by policies of the OHCA or OKDHS are considered in determining need. Available resources are those resources which are in hand or under the control of the individual.

(1) In defining need, OHCA and OKDHS recognize the importance of a member retaining a small amount of resources for emergencies or special need and has established a maximum resource standard a member or family may hold and be considered in need.
(2) Capital resources are evaluated on a monthly basis in determining eligibility for an applicant for medical services. An applicant is determined ineligible for any month resources exceed the resource standard at any time during that month. When a member has resources which exceed the resource standard, case closure action is taken for the next possible effective date.
(3) State law is specific on the mutual responsibility of spouses for each other. Therefore, if husband and wife are living together, a capital resource and/or income available to one spouse constitutes a resource and/or income to the other. When there is a break in the family relationship and the husband and wife are separated, but not divorced or legally separated, they constitute a possible resource to each other and this possible resource is explored to determine what, if any, resource can be made available. When spouse is in a nursing facility, see Subchapter 9 and 19 of this Chapter.

(4) Only the resources of the child determined eligible for TEFRA are considered in determining eligibility.
(5) Household equipment used for daily living is not considered a resource.
(6) Each time that need is determined, gross income and the equity of each capital resource are established. Equity equals current market value minus indebtedness. The member may change the form of capital resources from time to time without affecting eligibility so long as the equity is not decreased in doing so or increased in excess of the allowable maximum resource standard. In the event the equity is decreased as the result of a sale or transfer, the reduction in the equity is evaluated in relation to policy applicable to resources disposed of while receiving assistance.

(b) Eligibility. In determining eligibility based on resources, only those resources available for current use or those which the member can convert for current use (no legal impediment involved) are considered as countable resources. Examples of legal impediments include, but are not limited to, clearing an estate, probate, petition to sell or appointment of legal guardian.

(1) Generally, a resource is considered unavailable if there is a legal impediment to overcome. However, the member must agree to pursue all reasonable steps to initiate legal action within 30 days. While the legal action is in process, the resource is considered unavailable.

(2) If a determination is made and documented that the cost of making a resource available exceeds the gain, the member will not be required to pursue action to make it available.

(3) Determination of available and unavailable resources must be well documented in the case record.

(4) The major types of capital resources are listed in Sections OAC 317:35-5-41.1 through 317:35-5-41.7. The list is not intended to be all inclusive and consideration must be given to all resources.

317:35-5-41.6 (2)(I) and OAC 317:35-5-41.6(5)(C)

317:35-5-41.6 Trust accounts

Monies held in trust for an individual applying for or receiving SoonerCare must have the availability of the funds determined. Funds held in trust are considered available when they are under the direct control of the individual or his/her spouse, and disbursement is at their sole discretion. Funds may also be held in trust and under the control of someone other than the individual or his/her spouse, such as the courts, agencies, other individuals, etc., or the Bureau of Indian Affairs (BIA).

(2) Definition of terms. The following words and terms, when used in this paragraph, have the following meaning, unless the context clearly indicates otherwise:
(I) Revocable trust. Revocable trust means a trust in which the grantor has retained the right to terminate or revoke the trust and reclaim the trust principal and income. Unless a trust is specifically made irrevocable, it is revocable. Even an irrevocable trust is revocable upon the written consent of all living persons with an interest in the trust.....

(5) Trust accounts established after August 10, 1993. The rules found in (A) - (C) of this paragraph apply to trust accounts established after August 10, 1993.
C) There are two types of trusts, revocable trusts and irrevocable trusts.

(i) In the case of a revocable trust, the principal is considered an available resource to the individual. Home

property in a revocable trust under the direct control of the individual, spouse or legal representative retains the exemption as outlined in OAC 317:35-5-41.8(a)(2). Payments from the trust to or for the benefit of the individual are considered income of the individual. Other payments from the trust are considered assets disposed of by the individual for purposes of the transfer of assets rule and are subject to the 60 months look back period.

(ii) In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the principal, from which payment to the individual could be made is considered available resources. Payments from the principal or income of the trust is considered income of the individual. Payments for any other purpose are considered a transfer of assets by the individual and are subject to the 60 months look back period. Any portion of the trust from which, or any income on the principal from which no payment could under any circumstances be made to the individual is considered as of the date of establishment of the trust (or if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of the asset transfer rules and are subject to the 60 months look back period.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Dale and Pearl McAlary, Petitioners, husband and wife, both entered the Vici Nursing Home in Vici, Oklahoma on January 2, 2008. On January 22, 2008, the McAlarys applied for Medicaid with the Oklahoma Department of Human Services ("OKDHS"), wherein they disclosed a transfer of assets having a cash value of $178,030 to the McAlary Family Trust (the "Trust"). In exchange, the

McAlarys received a promissory note with a face value of $178,030 from the Trust.

The Trust was created by the McAlarys' daughter, Sandra Elliott, in her individual capacity and not as attorney-in-fact on behalf of the McAlarys. Ms. Elliott did not establish the Trust at the direction or upon the request of the McAlarys; instead, she established the Trust upon her own volition for the benefit of her parents.

B. The Administrative Proceedings

On March 18, 2008, OKDHS denied the McAlarys' Medicaid applications, and the McAlarys' application; (1) whether the promissory note had value, making the McAlarys ineligible because their resources exceeded applicable limits; and (2) if the promissory note was worthless, whether the McAlarys were subject to a penalty period for a transfer of assets. The administrative hearing resulted in a determination that the McAlarys were subject to a penalty period for a transfer of assets. After the McAlarys requested additional administrative review, OKDHS Director Howard Hendrick issued an opinion on July 18, 2008. Director Hendrick determined the Trust was a countable asset or, in the alternative, the McAlarys were subject to a penalty period for a transfer of assets.

C. The District Court Proceedings

The McAlarys sought judicial review of OKDHS' decision with the Dewey County District Court. The Honorable Ray Dean Linder granted the McAlarys' Motion for Summary Judgment, entering judgment in the McAlarys' favor on all issues.

D. The Appellate Court Proceedings

The Respondents herein sought review of the District Court's Order. The Court of Civil Appeals reversed the decision of the District Court, and reinstated the administrative decision, that "the OKDHS acted correctly in denying [the McAlarys'] Medicaid applications."

The Oklahoma Supreme Court issued an Order March 29, 2010 refusing to issue a Writ of Certiorari to the Oklahoma Court of Civil Appeals.

At every stage of the proceedings, the eligibility of Mr. and Mrs. McAlary for Medicaid benefits has been at issue. Mr. and Mrs. McAlary have continually and openly relied on applicable federal and Oklahoma Medicaid laws. OKDHS and the Court of Civil Appeals have ignored and misapplied federal law.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

REVIEW IS WARRANTED BECAUSE THE OPINION OF THE OKLAHOMA COURT OF CIVIL APPEALS AS TO THE AVAILABILITY OF THE TRUST IS CONTRARY TO FEDERAL MEDICAID LAW

The Oklahoma Court of Civil Appeals determined that the McAlary Family Trust was an available resource for Mr. and Mrs. McAlary in a determination of their Medicaid eligibility. There are no controlling published decisions in Oklahoma or the Tenth Circuit on this issue. The U.S. Supreme Court has not decided this important federal law question.

As the Court of Civil Appeals notes in its opinion, states that choose to participate in the Medicaid program must operate in compliance with federal statutes and regulations. Trust Co. of Okla. v. State ex rel. Dep't of Human Services, 825 P.2d 1295, 1300 (Okla. 1991); Coppola v. Fulton, 809 P.2d 1291, 1294-95 (Okla. 1991); Pharmcare Oklahoma, Inc. v. State Health Care Authority, 2007 OK CIV APP 5, 152 P.3d 267, 269-70.

42 U.S.C. §1396p(d)(2) determines whether a Trust, revocable or irrevocable, is a countable asset for Medicaid eligibility. The statutory provision states:

> ...an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will; (i) The individual. (ii) The individual's spouse. (iii) A person . . . with legal authority to act in place or on behalf of the individual or the individual's spouse. (iv) A person . . . acting at

> the direction of upon the request of the individual or the individual's spouse.

(emphasis added)

By analyzing the statute and the facts, it is clear that the McAlarys did not establish the Trust. First, their assets were not transferred to the Trust as required by the statute. The Trust purchased the McAlarys' assets by giving them a promissory note in exchange for the assets. The Trust has paid the McAlarys the full amount due under the promissory note. Any argument that the Trust still contains assets belonging to the McAlarys ignores the existence of the promissory note. That argument also ignores the consideration received by the McAlarys for the transfer, as well as potential future owners of the assets.

Second, none of the required individuals, as contemplated by the statute, established the Trust. Neither Mr. nor Mrs. McAlary established the Trust. The McAlarys' daughter, Sandra Elliott, established the Trust of her own volition and in her individual capacity, as evidenced by the Trust and Ms. Elliott's testimony in the administrative record. Neither Mr. nor Mrs. McAlary requested or directed Ms. Elliott to establish the Trust. The Court of Civil Appeals' determination that Ms. Elliott was acting as attorney-in-fact for the McAlarys was clearly erroneous. The determination was apparently based on Ms. Elliott's stated intention that the Trust be used to benefit her parents. The relevant statutes, both federal and state, do not discuss "intention" or "attorney-in-fact." Instead, the statutes consider "legal authority" and "direction or request." The Court of Civil Appeals' determination is also illogical, in that it presumes that any time a person serves as "attorney-in-fact" for a Medicaid applicant, that person can take no actions on his or her own behalf.

In determining the Trust to be a countable resource, OKDHS ignored 42 U.S.C. §1396p(d)(3). This statute, and

the Trust Co. case, emphasize that "The Medicaid Act requires the states to base assessments of financial need only on resources available to the applicant or recipient." Trust Co., 825 P.2d at 1300-01 (emphasis added). Trust Co. holds that a trust created for the primary purpose of providing non-medical support and containing provisions allowing the trustee discretion to provide medical care if the beneficiary ceases to qualify for medical assistance programs is not an "available resource" under the Medicaid Act or Oklahoma law. Id. at 1300. The Trust Co. court relied upon 42 U.S.C. §1396a(a)(17)(B), which states: "...A State plan for medical assistance must ... provide for taking into account only such incomes and resources as are ... available to the applicant or recipient ..." Additionally, the Court focused on a relevant federal regulation. The case references "42 C.F.R. §416.1201(a)." However, a reading of the case and an analysis of the federal regulations reveals that the court was actually referring to 20 C.F.R. §416.1201(a), which provides:

> ...resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

Id. at 1301.

The Oklahoma Administrative Code recognizes that in order for Trust assets to be counted toward Medicaid eligibility, the Trust assets must be available to applicants. OAC 317:35-5-41(a) provides: "The term capital resource is a general term representing any form of real and/or personal property which has an available money value. All available

capital resources ... are considered in determining need. Available resources are those resources which are in hand or under the control of the individual."

OAC 317:35-5-41(b) continues: "In determining eligibility based on resources, only those resources available for current use or those which the member can convert for current use (no legal impediment involved) are considered as countable resources ..." The trust provisions of OAC 317:35-5-41.6 also state assets of a trust are available only if they are in the direct control of the applicant and disbursement is at the applicant's sole discretion.

OKDHS has argued that Trust Co. is no longer good law because 42 U.S.C. §1396p(d)(3) and OAC 317:35-5-41(5)(C) were enacted two years after the decision was issued. However, the statutes and regulations relied upon by the Oklahoma Supreme Court in Trust Co. (i.e., 42 U.S.C. §1396a(a)(17)(B) and 20 C.F.R., §416.1201(a)) are unchanged and remain good law. Neither 42 U.S.C. §1396p(d)(3) nor OAC 317:35-5-41.6(5)(C) would have changed the basis for the Trust Co. decision. While the Oklahoma Court of Civil Appeals also attempts to distinguish Trust Co. from the facts of the case at bar, its reasoning is erroneous.

An analysis of the specific trust is required by the Oklahoma Administrative Code, specifically OAC 317:35-5-41.6(2)(l) which defines "revocable trust" as "a trust in which the grantor has retained the right to terminate or revoke the trust and reclaim the trust principal and income." Here, Ms. Elliott is the settlor and initial trustee. Ms. Elliott has complete and sole discretion is making distributions from the Trust. The Trust specifically provides that "Beneficiaries do not have the power to assign, encumber, direct, distribute, or authorize distributions" (Article III, Paragraph D of Trust).

Thus, a legal impediment exists – the terms of the Trust – which prevents the McAlarys from having authority to access the assets in the Trust. The McAlarys have no discretion regarding distributions. That the McAlarys'

daughter, Sandra Elliott, could choose to make some or all of the Trust assets available to the McAlarys is completely irrelevant in determining whether the Trust is an available resource for the applicants. This determination by the Court of Civil Appeals was also erroneous.

CONCLUSION

The Petitioners, Dale and Pearl McAlary, submit that the Oklahoma Court of Civil Appeals decided a question of substance regarding an issue previously decided by this Court when it determined that the McAlary Family Trust was an available resource for Mr. and Mrs. McAlary in a determination of their Medicaid benefits eligibility. Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: June 23, 2010.

Respectfully submitted,

Katresa J. Riffel
Jessica L. Caruthers
Mitchel, Gaston, Riffel & Riffel, PLLC

APPENDIX

THIS OPINION HAS BEEN RELEASED FOR
PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

Filed
COURT OF CIVIL
APPEALS
STATE OF OKLAHOMA

DEC 31 2009
Michael S. Richie
Clerk

DALE McALARY and PEARL McALARY,	
Plaintiffs/Appellees,	Case #106308
vs.	
STATE OF OKLAHOMA ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES; HOWARD HENDRICK, DIRECTOR OF OKLAHOMA DEPARTMENT OF HUMAN SERVICES; OKLAHOMA HEALTH CARE AUTHORITY; MIKE FOGARTY, DIRECTOR OF OKLAHOMA HEALTH CARE AUTHORITY; HOWARD HENDRICK, individually; and, GERRY MOORE, individually,	
Defendants/Appellants.	

APPEAL FROM THE DISTRICT COURT OF
DEWEY COUNTY, OKLAHOMA
HONORABLE RAY DEAN LINDER, TRIAL JUDGE

REVERSED

Michael W. Mitchel Katresa J. Riffel Craig Riffel Jessica L. Caruthers MITCHEL, GASTON, RIFFEL & RIFFEL, PLLC Enid, Oklahoma	For Plaintiffs/Appellees
Travis Smith Oklahoma City, Oklahoma	For Defendant/Appellant Oklahoma Department of Human Services; Howard Hendrick; Gerry Moore
Lynn Rambo-Jones Oklahoma City, Oklahoma	For Defendant/Appellant Oklahoma Department of Human Services Mike Fogerty

OPINION BY DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 The State of Oklahoma *ex rel.* Oklahoma Department of Human Services (OKDHS), Howard Hendrick, Director of OKDHS, Oklahoma Health Care Authority (OHCA),[1] Mike Fogarty, Director of OHCA, and Gerry Moore, individually, (collectively, the State) appeal the trial court's September 18,

[1] OHCA is the state agency designated to operate Oklahoma's Medicaid program.

2008, Order Granting Plaintiffs' Motion for Partial Summary Judgment in which the trial court found Dale McAlary and Pearl McAlary, husband and wife (McAlarys), were improperly denied Medicaid benefits and issued an injunction preventing the State from denying Medicaid benefits to McAlarys and those similarly situated.[2] We reverse.

¶2 On January 2, 2008, McAlarys moved from an assisted living facility to the Vici Nursing Home in Vici, Oklahoma. On January 8, 2008, McAlarys' daughter, Sandra Elliott (Daughter), created the McAlary Family Trust (the Trust).[3] McAlarys are beneficiaries of the Trust during their lifetimes, and when they are both deceased, the remainder will be evenly divided among their three children, including Daughter. Daughter, as trustee of the Trust, is authorized to use the entire corpus and income at any time for the benefit of her parents during their lifetimes. As stated by Daughter in Article III of the Trust:

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[2] In their March 25, 2008, Petition, McAlarys sought class certification for similarly situated Medicaid applicants. Administrative Record (AR), file #1, p. 7. The record fails to unequivocally impart the outcome or status of McAlarys' class certification quest. However, in the State's Brief in Support of Application to Assume Original Jurisdiction and Petition for Writ of Prohibition, on p. 3, the State avers that:

> On September 9, 2008, the McAlarys' Motion for Class Certification and Motion for Partial Summary Judgment came on for hearing before [the trial court]. Prior to hearing on the Motion for Class Certification, the parties agreed that they would be bound by the outcome of the final legal decision regarding the underlying Medicaid eligibility issue . . . . Therefore, the Motion was held in abeyance.

Although the trial court has already enjoined the State, in the appealed Order, from denying Medicaid benefits to "those similarly situated," it appears that the Motion for Class Certification is in abeyance pending the final legal decision on the Medicaid eligibility issue.

[3] AR, file #5, p. 722.

> It is my desire, by this instrument, to create a trust in accordance with the laws of the State of Oklahoma whereby property placed in this trust shall be managed for the benefit of Beneficiaries during Beneficiaries' lifetimes and distributed to the remainder beneficiaries named herein upon Beneficiaries' deaths. My primary purpose of this trust is to provide funds to be spent on behalf of the Beneficiaries. It is my intention to benefit the Beneficiaries to the fullest extent possible rather than the remainder beneficiaries.[4]

McAlarys, in their brief filed on January 20, 2009, state that Daughter did not establish the Trust at the direction or upon the request of McAlarys; instead, she established the Trust upon her own volition and in her individual capacity because she wanted to do some planning to benefit her parents.[5] However, at the administrative level it was found that Daughter established the Trust in her capacity as attorney in fact for McAlarys.[6]

¶3 On January 21, 2008, Daughter transferred $178,030 of McAlarys' money and property to the Trust. In return, McAlarys received a promissory note signed by Daughter in her capacity as trustee. The promissory note stated that the $178,030, plus four percent interest, would be repaid in six yearly installments of $29,671.76, beginning on January 8, 2009. However, the promissory note was unsecured and contained the following provision:

> This is a non-recourse note. Notwithstanding anything to the contrary in this note, the Borrower

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[4] AR, file #4, p. 128

[5] "Plaintiffs/Appellees' Brief in Chief," pp. 5, 21.

[6] AR, file #5, p. 722.

> shall not have any personal liability for payment of this note or any sums due hereunder, and the Lender and all subsequent holders shall look solely to the payments hereunder for payment and satisfaction of all sums due under this note.[7]

¶4 On January 22, 2008, McAlarys filed a Medicaid application with OKDHS. In a letter dated March 18, 2008, OKDHS denied both applications because it found McAlarys had "countable resources in excess of $2,000 on the date of application and for the 90 days preceding."[8] On March 19, 2008, McAlarys filed a Request for a Fair Hearing.

¶5 A hearing was held on June 4, 2008.[9] McAlarys argued at the hearing that their promissory note was unmarketable and had no value.[10] On June 19, 2008, the OKDHS Appeals Committee issued a decision in which it found OKDHS acted correctly in denying McAlarys' Medicaid applications because they had countable resources worth $178,030. The Appeals Committee found, in the alternative, that if the $178,030 in the Trust was not a countable resource of McAlarys, then when McAlarys proved their promissory note had no value, they proved, by extension, that they had made a transfer of $178,030 without receipt of fair market value.

¶6 On June 20, 2008, pursuant to 56 O.S. 2001 §168(C), McAlarys requested that Howard Hendrick, Director of OKDHS (Director Hendrick), review the hearing decision. On July 18, 2008, Director Hendrick issued his decision. Director Hendrick concluded that the Trust was an available resource to McAlarys and the promissory note had no value. Director Hendrick stated, in part, that:

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[7] AR, file #4, p. 139.
[8] AR, file #4, p. 771.
[9] Dale McAlary passed away prior to this hearing.
[10] AR, file #5, p. 723.

> [Daughter] is authorized to exhaust the Trust's corpus and income for the benefit of [McAlarys'] during their lives. According to [Oklahoma Administrative Code (OAC)] 317:35-5-41.6(5)(C), whether the Trust is revocable or irrevocable, the entire $178,030 corpus is considered an available resource to them. According to OAC 317:35-19-20(2)(B), each of the McAlarys is allocated $89,015, half of the $178,030. This exceeds the $2,000 Medicaid resource limit. After Mr. McAlary died, all of the corpus became [Pearl] McAlary's.

Director Hendrick also stated:

> If the Trust is a countable resource and the [promissory note] is worthless, then the [promissory note] should be considered a nullity because it has no practical effect. The McAlarys will benefit from the Trust either by payments to them directly, or for their benefit as Trust beneficiaries, or they will benefit from the Trust when [Daughter] makes payments of corpus and income to them as payments on the [promissory note].

Director Hendrick concluded:

> I find that OKDHS acted correctly in denying Mr. and Mrs. McAlary's Medicaid applications. The denial can be made on four separate grounds, as described above. Based on my conclusion that the Trust is an available resource and that the [promissory note] has no value, the Trust corpus constituted a countable resource to Mr. and Mrs.

McAlary until his death and to Mrs. McAlary alone thereafter.[11]

Director Hendrick's decision was the final decision at the administrative level. See 56 O.S. 2001 §168(C).

¶7 Pursuant to 56 O.S. 2001 §168(D), McAlarys appealed the OKDHS decision to the District Court of Dewey County by filing their Petition on March 5, 2008. In the trial court's September 18, 2008, Order Granting Plaintiffs' Motion for Partial Summary Judgment, the trial court found McAlarys were improperly denied Medicaid benefits and issued an injunction preventing the State from denying Medicaid benefits to McAlarys and those similarly situated. From this Order of the trial court, the State appeals.[12]

¶8 Once an administrative agency order is before us, the Oklahoma Administrative Procedures Act (OAPA), 75 O.S. §2001 and Supp. 2005 §§250-327, governs our review. *Pharmcare Oklahoma, Inc. v. State of Oklahoma Health Care*

[11] AR, file #5, pp. 727-729. Director Hendrick also stated that "if the Trust is found to be unavailable and/or the [promissory note] is found to be worthless, then the OKDHS denial would still be correct, for the reasons stated above." However, this was not his conclusion. Director Hendrick's conclusion was, in short, that the $178,030 was an available resource despite having been moved to the Trust and, because this placed McAlarys well beyond the $2,000 Medicaid resource limit, the denial of the McAlarys' Medicaid applications was proper.

[12] On September 29, 2008, the State filed an application for the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of prohibition preventing the trial court judge (or any other assigned judge) from enforcing the injunction issued against the State while the case proceeds on appeal. In an Order filed on January 26, 2009, the Oklahoma Supreme Court denied the State's application, stating "12 O.S. §§66 and 990.5 do not authorize an automatic stay of the injunction in this cause. The trial judge did not abuse his discretion in denying [the State's application] pending appeal." (Citations omitted).

Authority, 2007 OK CIV APP 5, 152 P.3d 267.[13] Under the OAPA, the trial court, the Oklahoma Court of Civil Appeals, and the Oklahoma Supreme Court apply the same standard of review to the administrative record. *Id. City of Tulsa v. State of Oklahoma ex rel. Public Employees Relations Board*, 1998 OK 92, 967 P.2d 1214.[14]

¶9 Generally, an administrative decision should be affirmed if it is a valid order and the administrative proceedings are free from prejudicial error. 75 O.S. §322(3).[15] An administrative order is subject to reversal, however, if an appealing party's substantial rights are prejudiced because the agency's decision is entered in excess of statutory authority or jurisdiction, or an order is entered based on an error of law. 75 O.S. 2001 §322(1)(b) and (d). Reversal is also appropriate if the agency's findings are clearly erroneous in view of the "reliable, material, probative and substantial competent evidence" in the record. 75 O.S. 2001 §322(1)(e). As to factual questions, neither a trial court nor this Court is entitled to substitute its judgment for that of the agency as to the weight of the evidence. *Id.*; *Board of Examiners of Veterinary Medicine v. Mohr*, 1971 OK 64, 485 P.2d 235.

¶10 We must accord great weight to the expertise of an administrative agency. *City of Hugo v. State of Oklahoma ex*

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[13] "[T]he clear intent of the Legislature in adopting the Administrative Procedures Act was to provide a uniform method of appeal from decisions of the various regulatory agencies and boards." *Lowry v. Board of Chiropractic Examiners*, 1981 OK 80, P 8, 631 P.2d 737, 738-39.

[14] As a result, this Court reviews the agency's decision, not the trial court's.

[15] We may not disturb the decision of an administrative agency "unless our review of the record leads us to a firm conviction that the agency is mistaken." *Carpenters Local Union No. 329 v. State of Oklahoma ex rel. Dep't of Labor*, 2000 OK CIV APP 96, P 3, 00 P.3d 1257, 1259.

rel. Public Employees Relations Board, 1994 OK 134, 886 P.2d 485. We may not substitute our judgment for that of the agency, and this holds true particularly in the area of the agency's expertise. *City of Midwest City v. Public Employees Relations Board*, 2003 OK CIV APP 36, 69 P.3d 1218.

¶11 The State argues that the $178,030 of McAlarys' money and property placed by Daughter into the Trust is an available resource to McAlarys, placing them well above the relevant resource limit and thereby disqualifying them from Medicaid eligibility in Oklahoma. This is consistent with the conclusion reached at the administrative level. In opposition, McAlarys argue that the $178,030 located in the Trust is not an available resource to them.[16]

McAlarys' Attempt to Supplement the Record

¶12 McAlarys argue they are entitled to introduce additional evidence on appellate review in the form of an affidavit attached to their brief because the State allegedly did not raise the issue of whether the Trust assets are a countable (i.e., "available") resource during the entire administrative process. In support, McAlarys cite to 75 O.S. 2001 §321, which states:

> The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

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[16] Although the State offers an alternative argument to which McAlarys respond, we find the issue of whether the Trust is an available resource is dispositive. See n.25, below.

McAlarys' attempt to supplement the record before this Court is not supported by §321. Section 321 applies to the trial court - - hence the reference to "a jury" and to "testimony." Absent a statute requiring otherwise, this Court will not consider as part of an appellate record any instrument or material which has not been incorporated into the assembled record by a certificate of the clerk of the trial court. *City of Lawton v. International Union of Police Associations, Local 24*, 2002 OK 1, P 7 n.15, 41 P.3d 371, 375 N.15 (Citations omitted.) A deficient record may not be supplemented by material physically attached to a party's appellate brief. *Id* at n.16.

¶13 Furthermore, the issue McAlarys allege was never raised by the State – whether the Trust assets are an available resource – was present from the first stage of the administrative process when OKDHS denied McAlarys' applications for this very reason.[17] In addition, it was present at the final stage of the administrative process because it received extensive treatment in the July 18, 2008, decision by Director Hendrick. In that decision,[18] Director Hendrick states:

> On July 10, 2008, you, as counsel for the McAlarys, were contacted by an OKDHS employee who was working with me on this decision. You were informed that the Trust was going to be treated as an available resource in this decision . . .[and] you were given excerpts dealing with the Trust from a draft of this decision and asked if you wished to submit comments. You declined.

Parties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited,

[17] AR, file #4, p. 771
[18] AR, file #5, p. 723

acquiesced or tacitly conceded in . . . ." *Samedan Oil Corporation v. Corporation Commission of the State of Oklahoma*, 1988 OK 56, P 7, 755 P.2d 664, 668. "[T]his is a well-settled rule which emanates from the very heart of the purpose served by an appeal." *Id.* McAlarys waived appellate relief as to this alleged error of their own accord.[19]

The Trust as an Available Resource to McAlarys

¶14 Prior to turning to the specific Oklahoma Administrative Code (OAC) sections which govern Medicaid eligibility in Oklahoma, it is important first to set forth the purpose and objective of the federal Medicaid Act. While a state is not obliged to participate in a Medicaid program, if it does participate, it must operate its program in compliance with the federal Medicaid Act. *Pharmcare Oklahoma, Inc. v. State of Oklahoma Health Care Authority*, 2007 OK CIV APP 5, 152 P.3d 267. "States do, however, have broad discretion to adopt standards for determining the extent of medical assistance, with the Act requiring only that the standards be reasonable and consistent with the objectives of the Medicaid Act." *Id.* at P 12 (citing 42 U.S.C. §1396a(a)(17)).[20]

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[19] We note that hearings at the administrative level to determine eligibility for Medicaid are "conducted in an informal manner without formal rules of evidence or procedure." OAC 317:2-1-5. Appeals from determinations made upon completion of such informal hearings are limited to "a record review at which the parties do not appear." OAC 317:2-1-2(a)(6)

[20] States that opt in and establish a Medicaid program must nevertheless follow the mandatory provisions found in the federal Medicaid Act, 42 U.S.C. §1396. For example, it is a basic canon of statutory construction that use of the word "shall" indicates a mandatory intent. *Keith v. Rizzuto*, 212 F.3d 1190, 1193 N.3 (10th Cir. 2000). (Citation omitted.) In sum:

> Each participating State develops a plan containing reasonable standards ... for determining eligibility for and the extent of medical assistance. An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives. [Nevertheless] State Medicaid plans must comply with requirements imposed both by the Act itself and by the Secretary of Health and Human Services . . . .

¶15 "congress established the Medicaid program in 1965 as Title XIX of the Social Security Act . . . to provide federal financial assistance to States that choose to reimburse certain medical costs incurred by the poor. *Blum v. Yaretsky*, 457 U.S. 991, 993-994, 102 S.Ct. 2777, 73 L.Ed. 534 (1982). (Citation omitted.) Medicaid was created by Congress "[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services ...." 42 U.S.C. §1396. (Emphasis added.) Hence, Medicaid is a welfare program and its fundamental objective is to provide medical services for the poor. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 667, 122 S.Ct. 2460, 153 L.Ed2d 604 (2002) (O'Connor concurring); *Soskin v. Reinerton*, 353 F.3d 1242 (10th Cir. 2004). "[Medicaid] is a cooperative program of the state and federal governments that provides medical assistance for the poor." *Pharmcare Oklahoma, Inc.*, at P12, 152 P.3d at 269. (Emphasis added.) Therefore, the specific OAC sections which we will apply in determining whether McAlarys are eligible for Medicaid payments in Oklahoma must be reasonable and consistent with the fundamental objective of providing medical assistance for the poor.

¶16 Oklahoma's Medicaid program is set forth in Title 317 of the OAC, 317:35-1 – 317:35-23. In order for an individual to receive payment for medical services under Oklahoma's

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Ramey v. Reinertson, 268 F.3d 955, 957 (10th Cir. 2001) (emphasis added) (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37, 101 S.Ct. 2633, 69 L.Ed 2d 460 (1981))

Medicaid program, he or she must meet the relevant eligibility requirements found therein, OAC 317:35-1-1.

¶17 As determined at the administrative level pursuant to OAC 317:35-19-21(2)(B), McAlarys' individual resource limit is $2,000.[21] If McAlarys' individual resources exceed this amount, then they are ineligible for Medicaid payments. OAC 317:35-19-21(2) explains how the resources of a couple such as the McAlarys are to be allocated. In pertinent part, §317:35-19-21(2) states that "resources are determined for each individual as the amount owned by each individual plus one-half of the jointly owned resources of the couple." If it is determined that the Trust is an available resource to McAlarys, then each spouse will own $89,015, or one-half, of this joint resource, placing each of them $87,015 above the $2,000 resource limit and thereby disqualifying them from eligibility for Medicaid payments. This resource limit is reasonable and consistent with the fundamental objective of Medicaid.

¶18 Determination of whether the Trust is an available resource to McAlarys begins with determining whether McAlarys "established" the Trust. OAC 317:35-5-41.6(5), which applies to trust accounts established after August 10, 1993, states, in part:

> (A) ... An individual is considered to have established a trust if assets of the individual were used to form all or part of the principal of the trust and if the trust was established other than by will and by any of the following individuals:

[21] AR, file #5, p. 724. According to the State, "resource" is the term used by Medicaid for what is commonly referred to as an asset. Brief-in-chief, p.2 n.1. In determining whether a person qualifies for Medicaid, that person's "resources" are calculated to determine whether they exceed the resource limit, and certain resources are specifically exempted. See OAC 317:35-5-40 – 317:35-5-49.

(i) the individual;

(ii) the individual's spouse;

(iii) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or

(iv) a person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) Where trust principal includes assets of an individual described in this subparagraph and assets of any other person(s), the provisions of this subparagraph apply to the portion of the trust attributable to the assets of the individual. This subparagraph applies without regard to the purposes for which the trust is established, whether the trustees have or exercise any discretion under the trust, and restrictions on when or whether distributions may be made from the trust, or any restrictions on the use of the distribution from the trust.

The above OAC language does not require that the individual or the individual's spouse establish the trust. Rather, the OAC states that even if a trust is established by a person with legal authority to act in place of or on behalf of the individual, or even if a trust is established by a person acting at the direction or upon the request of the individual, the individual will be considered to have established the trust.

¶19 The Trust was established by Daughter. Evidence that Daughter acted on behalf of McAlarys as their attorney in fact includes Daughter's statement in Article III of the Trust that her primary purpose in establishing the Trust was to provide funds to be spent on behalf of McAlarys, and it was her intention to benefit McAlarys to the fullest except possible rather than the remainder beneficiaries. Additionally, within just two weeks of establishing the Trust, it was funded by $178,030 of McAlarys' own money and property (on January 21, 2008). Furthermore, just one day after the $178,030 was placed in the Trust (on January 22, 2008), McAlarys applied for Medicaid. The administrative agency found that when Daughter established the Trust, she was acting on behalf of McAlarys as their attorney in fact. In view of the "reliable, material, probative and substantial competent evidence" in the record, this finding is not clearly erroneous. 75 O.S. 2001 §322(I)(3). Therefore, since the record supports the finding that Daughter acted on behalf of McAlarys, we must consider McAlarys to have established the Trust. OAC 317:35-5-41.6(5).[22] We must accord great

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[22] For this reason, McAlarys' reliance on *Trust Company of Oklahoma v. State of Oklahoma ex rel. Dept. of Human Services*, 1991 OK 133, 825 P.2d 1295, is misplaced. That is, in *Trust Company*, the trust was not deemed to have been established by the beneficiary, a young girl injured in a car accident; instead, the trust was established by the tortfeasor responsible (or partly responsible) for the young girl's injuries. See *Trust Company of Oklahoma*, at P 11 n.31, 825 P.2d at 1303 n.31. The Oklahoma Supreme Court held that, in such a situation (i.e., where the trust is not considered to have been established by the beneficiary), a trust created for the primary purpose of providing nonmedical support, and containing a provision allowing the trustee discretion to provide medical care if the beneficiary ceases to qualify for medical assistance programs, is not an "available resource." Here, however, the record supports the administrative finding that McAlarys, beneficiaries of the Trust, established the Trust themselves via their Daughter. Second, *Trust Company of Oklahoma* was decided several years before OAC 317:35 et seq. was added to the Oklahoma Administrative Code, including the sections utilized in this Opinion. Third, the Trust was not explicitly created for the primary purpose of providing nonmedical support as was the case in *Trust Company of Oklahoma*. For these reasons, *Trust Company of Oklahoma* is not persuasive on the facts presented.

deference to the factual findings and conclusions of an administrative agency. 75 O.S. 2001 §322(1)(e); *Board of Examiners of Veterinary Medicine v. Mohr*, 1971 OK 64, 485 P.3d 235. Even if competent evidence exists in opposition to a factual finding, this Court is not entitled to substitute its judgment for that of the agency as to the weight of the evidence. *Id.* Moreover, we must accord great weight to the expertise of an administrative agency. *City of Hugo v. State of Oklahoma ex rel. Public Employees Relations Board*, 1994 OK 134, 886 P.2d 485.

¶20 Having determined that McAlarys must be considered to have established the Trust, we must now focus on the Trust itself to determine if it was an "available resource" to McAlarys. OAC 317:35-5-41.6(5) states, in pertinent part:

> (C) There are two types of trusts, revocable trusts and irrevocable trusts.
>
> (i) In the case of a revocable trust, the principal is considered an available resource to the individual. Home property in a revocable trust under the direct control of the individual, spouse or legal representative retains the exemption as outlined in OAC 317:35 5-41.8(2). Payments from the trust to or for the benefit of the individual are considered income of the individual. Other payments from the trust are considered assets disposed of by the individual for purposes of the transfer of assets rule and are subject to the 60 months look back period.
>
> (ii) In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the principal, from which payment to

> the individual could be made is considered available resources. Payments from the principal or income of the trust is considered income of the individual. Payments for any other purpose are considered a transfer of assets by the individual and are subject to the 60 months look back period. Any portion of the trust from which, or any income on the principal from which no payment could under any circumstances be made to the individual is considered as of the date of establishment of the trust (or if later, the date on which payment to the individual was foreclosed) to be assets disposed [of] by the individual for purposes of the asset transfer rules and are subject to the 60 months look back period.

Under this language it is unnecessary to determine whether the Trust is revocable or irrevocable. Either way, the Trust is an available resource to McAlarys. If the Trust is a revocable trust, then the $178,030 simply "is considered an available resource to [McAlarys]." If the Trust is an irrevocable trust, then the $178,030 is also an available resource to McAlarys because there are circumstances under which payment of all of the $178,030 from the Trust could be made to or for the benefit of McAlarys. Once again, as stated by Daughter in Article III of the Trust:

> It is my desire, by this instrument, to create a trust . . . whereby property placed in this trust shall be managed for the benefit of [McAlarys'] lifetimes and distributed to the remainder beneficiaries named herein upon [McAlarys'] deaths. My primary purpose of this trust is to provide funds to be spent on behalf of [McAlarys]. It is my intention to benefit [McAlarys] to the fullest extent possible rather than the remainder beneficiaries.

Therefore, the $178,030 in the Trust is an available resource to McAlarys. As stated above, this places them well above the applicable Medicaid resource limit, thereby disqualifying them from Medicaid eligibility.

¶21 The specific sections of the OAC requiring this result are reasonable and consistent with the fundamental objective of Medicaid to serve the poor. Furthermore, these specific sections follow the mandatory requirements set forth in 42 U.S.C. §1396p(d). "The legislative purpose behind §1396 is clear from the language of the statute. Congress required that states generally count trust assets . . . for purposes of determining Medicaid eligibility . . ." *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000).[23] The "available asset rule," as set forth in §1396, "is consistent with Congress's intent to strictly limit Medicaid payments to the 'truly needy.'" *Gayan v. Illinois Dept. of Human Services*, 342 Ill. App. 3d 1035, 796 N.E. 2d 657, 661, 277 Ill. Dec. 571 (Ill. App. 2003) (citing *Cherry by Cherry v. Sullivan*, 30 F.3d 73, 75 (7th Cir. 1994).[24]

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[23] Nevertheless, Congress exempted certain "income trusts" from this requirement. *Id.* In Oklahoma, OAC 317:35-5-41.6(6) lists certain exempt trusts, but none are applicable to this appeal.

[24] "[I]n 1986, Congress reiterated its intent that Medicaid was designed to provide basic medical care for those without sufficient income or resources to provide for themselves and thus passed 42 U.S.C. §1396a(k)." *Ramey v. Reinertson*, 268 F.3d 955, 958 (10th Cir. 2001). Section 1396a(k) was known as the MQT statute because it worked to include Medicaid qualifying trusts (MQTs) into the calculation of available resources. *Id.* With its passage, "MQTs were no longer a permissible means to shelter assets for purposes of Medicaid eligibility." *Id.* at 959. In the years that followed:

> Congress remained true to its conviction that MQTs were an impermissible means of sheltering assets for purposes of Medicaid eligibility. In fact, in 1993, §1396a(k) was repealed by Congress and replaced by another statute *even less forgiving* of such trusts. See 42 U.S.C. §1396p(d) (1993). This statute added stringent criteria

¶22 We must "affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error . . . ." 75 O.S. 2001 §322(3). Finding no prejudicial error at the administrative level, we reverse the Order of the trial court.[25]

CONCLUSION

¶23 For the reasons set forth, we reverse the Order of the trial court and reinstate the administrative decision "that OKDHS acted correctly in denying [McAlarys'] Medicaid applications." If the OHCA determines an overpayment has been made as a result of the injunction

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regarding the treatment of MQTs . . . .

Id. (Citation omitted, emphasis added.)

Section 1396p(d) is still in effect in the federal Medicaid Act, and it is currently followed in Oklahoma under OAC 317:35-5-41.6(5), as reflected in this Opinion.

[25] Having found that the $178,030 placed in the Trust is an available resource to McAlarys, we need not address the second issue raised on appeal: whether the placement of the $178,030 in the Trust was a transfer without receipt of fair market value despite the fact that McAlarys received a promissory note in return. Our determination that the money is an available resource to McAlarys renders resolution of this second issue unnecessary. Furthermore, as determined by Director Hendrick upon finding the Trust to be an available resource, "the [promissory note] should be considered a nullity because it has no practical effect." AR, file #5, p.728. We must accord great weight to the expertise of an administrative agency. *City of Hugo v. State of Oklahoma ex rel. Public Employees Relations Board*, 1994 OK 134, 886 P.2d 485. Finally, determination of the second issue hinges on Constitutional law; specifically, on the Supremacy Clause of the United States Constitution and whether and to what extent certain federal Medicaid sections preempt certain allegedly conflicting sections of the OAC. The general rule is that where legal relief is available on alternative, non-constitutional grounds, we avoid reaching a determination on the constitutional basis. *Pharmcare Oklahoma, Inc.*, 2007 OK CIV APP 5, P.35, 152 P.3d 267. Based on this general rule and on the reasons stated above, we decline to reach this issue.

issued by the trial court, it may institute a recoupment procedure pursuant to OAC 317:35-13-5(b)(1).[26]

¶27 REVERSED.

WISEMAN and GOODMAN, concur.

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[26] OAC 317:35-13-5 is entitled "Overpayments." OAC 317:35-13-5(b) states:

When it is determined that an incorrect payment has been made due to OHCA error, provider error or fiscal agent processing error, the procedures for correcting the payment errors are:

(1) When the OHCA determines an overpayment has been made, automatic offset recoupment procedures are processed through the claims processing contractor. This process is followed when the overpayment is discovered by the OHCA or the fiscal agent.

Any payments made pursuant to the injunction issued by the trial court are tantamount to incorrect payments made "due to OHCA error, provider error or fiscal agent processing error," and, therefore, a recoupment procedure may commence, as set forth above, to recover any "overpayments." This is consistent with McAlarys' position that, "[i]f [the trial court's] decision is ultimately reversed upon appeal, [the State has] a right to recover benefits from McAlarys and the Trust established for their support. [The State] will not be harmed in any way by the immediate enforcement of [the trial court's] Order." McAlarys' Response to Petitioners' Application to Assume Original Jurisdiction, p. 5.

IN THE DISTRICT COURT OF DEWEY COUNTY
STATE OF OKLAHOMA

Dewey County Oklahoma
FILED
SEP 18 2008
Nancy Louthan, Ct. Clerk
By _____
Deputy

DALE MCALARY and PEARL MCALARY,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
STATE OF OKLAHOMA, ex rel.	)	Case No.
OKLAHOMA DEPARTMENT OF HUMAN	)	CJ-2008-21
SERVICES, HOWARD HENDRICK,	)	
Director of Oklahoma Department of	)	
Human Services; OKLAHOMA HEALTH	)	
CARE AUTHORITY, MIKE FOGARTY,	)	
Director of Oklahoma Health Care	)	
Authority; HOWARD HENDRICK,	)	
Individually and GERRY MOORE,	)	
individually,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

Now on this 9th day of September, 2008, this case comes on for hearing on the Plaintiffs' Motion for Partial Summary Judgment against the Defendants State of Oklahoma ex rel, Oklahoma Department of Human Services,

Howard Hendrick, Director of Oklahoma Department of Human Services (OKDHS), Oklahoma Health Care Authority, Mike Fogarty, Director of Oklahoma Health Care Authority (OHCA) and Gerry Moore, individually and Defendants Response to Motion for Partial Summary Judgment. Plaintiffs appear by and through counsel, Craig Riffel and Dalen D. McVay of Mitchel, Gaston, Riffel & Riffel, PLLC. Defendant OKDHS appears by and through counsel Travis Smith and Defendant OHCA appears by and through counsel, Lynn Rambo-Jones. The Court having reviewed the administrative record, briefs filed by all parties and hearing arguments of counsel finds as follows:

1. This matter is properly before this Court pursuant to 75 O.S. §321 and §322.

2. Pursuant to the standards in 75 O.S. §321 and §322, OKDHS, Director & OHCA improperly denied Plaintiff's eligibility for Medicaid benefits.

3. Plaintiff is entitled to receive full Medicaid benefits effective September 15, 2008, with all other similarly situated applicants being entitled to receive full Medicaid benefits effective on the date of their applications.

4. A prohibitive injunction is hereby issued preventing Defendants and any of their employees or agents from denying Medicaid benefits to the Plaintiffs and those similarly situated and from acting contrary to the terms of this Order.

5. Plaintiffs' Motion for Partial Summary Judgment is GRANTED.

IT IS SO ORDERED.

/s/ Ray Dean Linder
Honorable Ray Dean Linder
Chief Judge

APPROVED AS TO FORM AND CONTENT:

/s/ Craig Riffel
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July 18, 2008

Craig Riffel
Mitchel, Gaston, Riffel & Riffel, PLLC
P.O. Box 5557
Enid, OK 73702

Re:	Dale McAlary	Pearl McAlary
	A105830	A105831
	H-52431	H-52432

Dear Mr. Riffel:

As Director of the Oklahoma Department of Human Services (OKDHS), one of my responsibilities is the review of administrative hearing decisions issued by this agency. These reviews are performed at the request of clients and concern their eligibility for benefits from certain OKDHS programs. In the cases of Dale and Pearl McAlary, the issue is whether OKDHS acted correctly in denying their applications for Medicaid to pay for their nursing home care.

THE FACTS

Mr. McAlary had been living in an assisted living facility for about a year when Mrs. McAlary moved into the same facility in September 2007. They moved from assisted living to a nursing home on January 2, 2008.

On January 8, 2008, the McAlarys' daughter, Sandra Elliott, created the McAlary Family Trust ('Trust' or 'the Trust'). Mr. and Mrs. McAlary are the beneficiaries of the Trust during their lifetimes. When they are both dead, the remainder will be evenly divided between their three children, including Mrs. Elliott. Mrs. Elliott, as trustee of the Trust ('Trustee') was authorized to use the entire corpus and income to the McAlarys' children. In addition, Trustee can terminate the Trust at any time and distribute the entire corpus and income to the McAlarys' children.

On January 21, 2008, Mrs. Elliott, in her capacity as attorney in fact for Mr. and Mrs. McAlary, transferred $178,030 of their money and property to the Trust. In return, Mr. and Mrs. McAlary received a Non-Recourse Non-Collateralized Promissory Note ('Note' or 'the Note') from the Trust, which was signed by Mrs. Elliott in her capacity as Trustee. The Note repaid the $178,030, plus 4% interest, in six yearly installments of $29,671.76, beginning on January 8, 2009. The Note was unsecured and also contained the provision:

> This is a non-recourse note. Notwithstanding anything to the contrary in this note, the Borrower shall not have any personal liability for payment of this note or any sums due hereunder, and the Lender and all subsequent holders shall look solely to the payments hereunder for payment and satisfaction of all sums due under this note.

OKDHS received the McAlarys' applications for Medicaid on February 4, 2008. On March 18, 2008, OKDHS denied both applications because the McAlarys had countable resources of $178,030 – well in excess of the Medicaid resource limit.

On March 19, 2008, Mr. and Mrs. McAlary filed a Request for Fair Hearing.

Mr. McAlary died before the hearing was held.

A hearing was held on June 4, 2008. You, as counsel for Mrs. McAlary, argued that the Note was unmarketable and therefore had no value. Genex Capital refused to buy the Note because the borrower was not credit rated, the note was non-recourse to the borrower, and no security was offered. As a result, Genex thought that the risk of loss in the event of non-payment was substantial and therefore was not interested in purchasing. The City National Bank of Guymon did not buy the Note because it does not buy any third party notes.

On June 19, 2008, the OKDHS Appeals Committee issued a decision in which it found that OKDHS acted correctly in denying the McAlarys' Medicaid applications because they had countable resources worth $178,030. The Appeals Committee further found that when Mrs. McAlary proved the Note had no value, she also proved that she and her husband had made a transfer of $178,030.

On June 20, 2008, Mrs. McAlary asked that I review the hearing decision.

On July 10, 2008, you, as counsel for the McAlarys, were contacted by an OKDHS employee who was working with me on this decision. You were informed that the Trust was going to be treated as an available resource in this decision. Since the Trust was not treated as a resource in the original notice of denial or in the Appeals Committee decision, you were given excerpts dealing with the Trust from a draft of this decision and asked if you wished to submit comments. You declined.

THE LAW

Division of Resources

OAC 317:35-19-21(2) explains how resources[27] of a couple are allocated, for purposes of determining Medicaid eligibility, when both are living in a nursing home.

> For an individual with a spouse who is institutionalized in a NF or ICF/MR, or who receives ADvantage or HCBW/MR services, or is 65 or over and in a mental health hospital, resources are determined for each individual as the amount owned by each individual plus one-half of the jointly owned resources of the couple. Once this separation of assets is made, a resource of either spouse is not considered available to the other during institutionalization.

The resources allocated to each spouse is then compared to the $2,000 resource limit to determine if the individual is eligible for Medicaid. OAC 317:35-19-21(2)(B), OKDHS Appendix C-1, Schedule VIII.D.

Trusts

OAC 317:35-5-41.6 deals with resources of a Medicaid applicant or recipient that are held in trust. OAC 317:35-5-41.6(5) deals with trusts established after August 10, 1993. OAC 317:35-5-41.6(5)(C) says:

(i) In the case of a revocable trust, the principal is considered an available resource to the individual.

[27] 'Resource' is the term used by Medicaid for what the rest of the world calls an asset.

Home property in a revocable trust under the direct control of the individual, spouse or legal representative retains the exemption as outlined in OAC 317:35-5-41.8(a)(2). Payments from the trust to or for the benefit of the individual are considered income of the individual. Other payments from the trust are considered assets disposed of by the individual for purposes of the transfer of assets rule and are subject to the 60 months look back period.

(ii) In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the principal, from which payment to the individual could be made is considered available resources. Payments from the principal or income of the trust is considered income of the individual. Payments for any other purpose are considered a transfer of assets by the individual and are subject to the 60 months look back period. Any portion of the trust from which, or any income on the principal from which no payment could under any circumstances be made to the individual is considered as of the date of establishment of the trust (or if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of the asset transfer rules and are subject to the 60 months look back period.

Promissory Notes

Promissory notes are addressed at 42 U.S.C. § 1396p(c)(1)(I), which says:

> For purposes of this paragraph with respect to a transfer of assets, the term 'assets' includes funds

used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage - -

(i) has a replacement term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii) prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of causes (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

There are two sections of the Oklahoma Administrative Code that address the treatment of promissory notes when determining Medicaid eligibility. OCA 317:35-5-41.5 says, in part:

(a) The amount which can be realized from promissory notes, loans, mortgages, and similar instruments, if offered for immediate sale, constitutes a countable resource. Promissory notes, loans, mortgages, and similar instruments have value regardless of whether there is an actual offer. Appraisals obtained from bankers, realtors, loan companies and others qualified to make such estimates are obtained in determining current market value. When a total resource approaches the maximum, it is desirable to get two or more estimates.

(b) Promissory Notes, loans, and mortgages (including contracts for deed) which are income producing are liquid countable resources.
(c) For an individual who has purchased a promissory note, loan, or mortgage on or after February 8, 2006, and is applying for long-term care services, see OAC 317:35-5-41.8(b).

OAC 317:35-5-41.8(b) says:

The rules regarding the treatment of funds used to purchase a promissory note, loan, or mortgage on or after February 8, 2006, are found in (1) through (2) of this subsection.
(1) Funds used to purchase a promissory note, loan, or mortgage on or after February 8, 2006, are treated as assets transferred for less than fair market value in the amount of the outstanding balance due on the note, loan, or mortgage as of the date of the individual's application for medical assistance unless the note, loan, or mortgage meets all of the conditions in paragraphs (A) through (C) of this paragraph.
(A) The note, loan, or mortgage has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the United States Social Security Administration).
(B) The note, loan, or mortgage provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made.
(C) The note, loan, or mortgage prohibits the cancellation of the balance upon the death of the lender.
(2) Funds used to purchase a promissory note, loan, or mortgage for less than its fair market value are

treated as assets transferred for less than fair market value regardless of whether:

(A) The note, loan, or mortgage was purchased before February 8, 2006, or
(B) The note, loan, or mortgage was purchased on or after February 8, 2006, and the conditions described in paragraph (1) of this subsection were met.

Transfers

OAC 317:35-19-20(4) says:

> An institutionalized individual, an institutionalized individual's spouse, the guardian or legal representative of the individual or individual's spouse who disposes of assets on or after August 11, 1993, but before February 8, 2006 for less than fair market value on or after the look-back date specified in (A) of this paragraph subjects the individual to a penalty period for the disposal of such assets.

The number of months of disqualification is determined by dividing the total uncompensated value of the asset by $2,000. 'Uncompensated value' is defined as ". . . the difference between the fair market value at the time of transfer less encumbrances and the amount received for the resource." OAC 317:35-19-20(4)(D). OAC 317:35-19-20(4)(C) says:

> The penalty period begins the first day of the first month during which assets have been transferred and which does not occur in any other period of ineligibility due to an asset transfer. When there have been multiple transfers, all transferred assets are added together to determine the penalty.

OAC 317:35-19-20(5) says:

> An institutionalized individual, an institutionalized individual's spouse, the guardian or legal representative of the individual or individual's spouse who disposes of assets on or after February 8, 2006 for less than fair market value on or after the look-back date specified in (A) of this paragraph subjects the individual to a penalty period for the disposal of such assets.

The number of days of disqualification is determined by dividing the total uncompensated value of the asset by $132.85. OAC 317:35-19-20(5)(E). OAC 317:35-19-20(5)(C) says:

> The penalty period will begin with the later of:
> (i) the first day of a month during which assets have been transferred for less than fair market value; or
> (ii) the date on which the individual is:
> (I) eligible for medical assistance; or
> (II) receiving institutional level of care services that, were
> it not for the imposition of the penalty period, would be
> covered by SoonerCare.

The penalty period can be ended if the asset is returned or fair market value is paid. OAC 317:35-19-20(4)(H); OAC 317:35-19-20(5)(J).

ANALYSIS

Trustee is authorized to exhaust the Trust's corpus and income for the benefit of Mr. and Mrs. McAlary during their lives. According to OAC 317:35-5-41.6(5)(C), whether the

Trust is revocable or irrevocable, the entire $178,030 corpus is considered an available resource to them. According to OAC 317:35-19-20(2)(B), each of the McAlarys is allocated $89,015, half of the $178,030. This exceeds the $2,000 Medicaid resource limit. After Mr. McAlary died, all of the corpus became Mrs. McAlary's.

If the Trust is an Available Resource and the Note Has Value

OAC 317:35-5-41.5(a) says:

> The amount which can be realized from promissory notes, loans, mortgages, and similar instruments, if offered for immediate sale, constitutes a countable resource. Promissory notes, loans, mortgages, and similar instruments have value regardless of whether there is an actual offer.

When OKDHS issued the denial of Mr. and Mrs. McAlary's applications, they had not presented evidence regarding the value of the Note. It was therefore perfectly reasonable for OKDHS to count the Note at its face value and deny their applications on that basis.

If the Note is valued at its face amount and the Trust is a countable resource, then the McAlarys have resources of $356,060. Even though the Note is for the same amount that the McAlary's transferred to the Trust, the countable value of the Trust is not reduced by the outstanding balance of the Note because the corpus does not secure the Note.

Each $1 payment on the Note reduces the countable resources by $2 because the value of the note is reduced by $1 as well as the corpus of the Trust being reduced by $1. However, if Trustee makes payments for the McAlary

benefit, or gives them cash that is not a Note payment, then the value of the Trust is reduced dollar-for-dollar but the value of the Note remains the same.

If the Trust is a Countable Resource and the Note Has No Value

If the Trust is a countable resource and the Note is worthless, then the Note should be considered a nullity because it has no practical effect. The McAlarys will benefit from the Trust either by payments to them directly, or for their benefit as Trust beneficiaries, or they will benefit from the Trust when Trustee makes payments of corpus and income to them as payments on the Note. Alternatively, if the Note has no value, the transfer to the trust may also be considered a transfer for which a penalty period may apply since the Trustee possesses the power to spray the principal to Mr. and Mrs. McAlary's children.

If the Trust is Not a Countable Resource and the Note Has Value

If the Trust is not a countable resource and the Note has value, then the McAlarys have a countable resource, the Note, worth $174,030. There was no transfer penalty because they received a resource valued at $178,030 in return for their transfer of $178,030 of resources to the Trust.

If the Trust is Not a Countable Resource and the Note Has No Value

The McAlarys did not attempt to show that the Note was worthless until the administrative hearing. At Mrs. McAlary's request the OKDHS Appeals Committee addressed the issue.

Mrs. McAlary asserts that acceptance of the worthless Note is not a transfer without commensurate return because it contains the terms required by 42 U.S.C. § 1396p(c)(1)(I). This argument is rejected because 42 U.S.C. § 1396(p)(c)(1)(I) describes a legitimate promissory note, one with terms a prudent person **would** accept. repayment in equal payments during the expected life and, if holder of the note dies before it is paid, the borrower has to continue paying. In addition, it must be assumed that such a note is actually enforceable by the holder.

In contrast, the note the McAlarys received contains terms that no prudent person would accept in an arms-length transaction, and which were not contemplated by Congress or the President when DRA 2005 was enacted into law. Nowhere in the extensive DRA 2005 legislative history is there anything that indicates approval of an arrangement like that entered into by Mr. and Mrs. McAlary and which has terms that make any potential purchaser reject it.

Mr. and Mrs. McAlary made a transfer without receiving fair market value when they transferred assets worth $178,030 to the Trust in return for the Note which contained terms making it unenforceable, and therefore worthless. The disqualification period is 1,340 days, beginning January 21, 2008. The penalty period is calculated by dividing $178,030 by $132.85. One penalty day is allocated to Mr. McAlary and one to Mrs. McAlary from the date of their Medicaid application until the date of his death. Thereafter, all penalty days are allocated to Mrs. McAlary.

CONCLUSION

I find that OKDHS acted correctly in denying Mr. and Mrs. McAlary's Medicaid applications. The denial can be made on four separate grounds, as described above. Based on my

conclusion that the Trust is an available resource and that the Note has no value, the Trust corpus constituted a countable resource to Mr. and Mrs. McAlary until his death and to Mrs. McAlary alone thereafter. However, if the Trust is found to be unavailable and/or the Note is found to be worthless, then the OKDHS denial would still be correct, for the reasons stated above.

If Mrs. McAlary or the personal representative of Mr. McAlary's estate disagree with my decision, 56 O.S. § 168 gives them the right to pursue judicial review by filing a petition in the district court for the county in which they live within thirty days of this decision.

Very truly yours,

/s/ Howard H. Hendrick

Howard H. Hendrick, Director
Department of Human Services

c: S.O. Files
Appeals
Dewey County Director
Lynn Rambo-Jones, OHCA

OKLAHOMA DEPARTMENT OF HUMAN SERVICES

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June 19, 2008

Craig Riffel
Attorney at Law
P.O. Box 5557
Enid, OK 73702

Re: HEARING DECISION
McAlary, Dale
A105830, H-52431
McAlary, Pearl
A105831, H-52432

Dear Mr. Riffel:

After careful study of the record of the hearing held on June 4, 2008, in your appeal of the decision of the Dewey County Department of Human Services, the State Department of Human Services has reached the following decision.

Testimony and other evidence presented in the hearing established that the issue of the appeal is the denial of an application for medical assistance for Dale and Pearl McAlary. The notice of denial is dated March 18, 2008, and indicates in summary that the denial of the application is based on Mr. & Mrs. McAlary having countable resources in excess of $2,000.00 on the date of application and for the 90 days proceeding.

DHS presented evidence in the hearing to show that Mr. & Mrs. McAlary entered the nursing facility on January 2, 2008. On January 8, 2008, the clients' daughter, Sandra Elliott, created the McAlary Family Trust. Ms. Elliott is Power of Attorney for the clients, Settlor and Trustee of the McAlary Family Trust. On January 21, 2008, Ms. Elliott, as Power of Attorney and Trustee, transferred $178,030.00 of the clients' money and property to the McAlary Family Trust. In return, the McAlarys received a promissory note initiated by Ms. Elliott, as Trustee, promising to pay Mr. & Mrs. McAlary six (6) annual installments of $29,671.76 plus 4% interest beginning January 8, 2009.

On January 22, 2008, the McAlarys requested that an assessment be completed by DHS to determine their income and resources and an application for Medicaid was received on February 4, 2008. The application was denied on March 18, 2008, as DHS determined the promissory note to be a resource to Mr. & Mrs. McAlary according to OAC 371:35-19-21, which indicates in part that in order for an individual with a spouse who is institutionalized in a nursing facility or ICFMR to be eligible for nursing facility services, his or her countable resources cannot exceed the maximum resource standard for an individual listed on OKDHS Appendix C-1, Schedule VIII-D, which is $2,000.00.

At the time the notice was issued on March 18, 2008, it was DHS's opinion that the promissory note in question was a countable resource to the McAlarys. Since the promissory note was purchased after February 8, 2006, OAC 317:35-5-41.8(b), was also referenced at the time of the hearing indicating that the funds used to purchase the promissory note on or after February 8, 2006, are treated as assets transferred for less than fair market value in the amount of the outstanding balance due on the note as of the date of the

individual's application for medical assistance unless the note contained the language that the note had a repayment term that was actualarily sound [sic]. The note provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments made and the note prohibits the cancellation of the balance upon the death of the lender.

It is the Agency's position that if these conditions were met that the value of the note would be considered a resource rather than a transfer of assets without commensurate return.

It is the Agency's position that if these conditions were met that the value of the note would be considered a resource rather than a transfer of assets without commensurate return.

Consequently, as of March 18, 2008, the McAlary's application was denied due to having countable resources in excess of $2,000.00 as of the date of the application and the 90 days proceedings [sic].

Consequently, as of March 18, 2008, the McAlary's application was denied due to having countable resources in excess of $2,000.00 as of the date of the application and the 90 days proceedings [sic].

Ms. Jones, as representative for the Oklahoma Health Care Authority, questioned the contents of the Trust. At the time of the hearing there was no documentation to support that the home had ever been deeded to the Trust, therefore, creating a question for the Health Care Authority as to whether the home still remained in the McAlary's names. Ms. Jones further indicated that Ms. Elliott became Power of Attorney for Mrs. McAlary on March 29, 2007 and for Mr.

McAlary on July 2, 2007. As Power of Attorney, Ms. Elliott created a Trust and as Settlor, transferred to herself the proceeds of the Trust. Mr. & Mrs. McAlary are beneficiaries of the Trust and the children are the remainder beneficiaries. Ms. Elliott then initiated a promissory note as a means of repayments. However, the note was a non-resource, non collateral promissory note with no avenue for recoupment and no obligation to repay. Further, the terms of the note relied on the life expectancy of only one client rather than considering the life expectancy of both clients. It was Ms. Jones' opinion that your clients have attempted to shelter resources by creating the Trust and the subsequent promissory note.

As attorney for Mr. & Mrs. McAlary, you introduced documents, and a brief marked as Exhibit 5, in which you state that your clients have transferred non-producing minerals, automobile, home and cash having a total fair market value of $178,030.00 to the McAlary Family Trust in exchange for $178,030.00 promissory note. It is your opinion based on federal law and state policy, that the promissory note is not a countable asset as federal law and state policy require assets to have an available money value in order to be countable assets. You explained that the promissory note was offered for sale to three lenders. All three lenders determined the promissory note to not have any value and all were unwilling to purchase the promissory note.

You pointed out that in an administrative decision in 2006, the OKDHS Appeals Committee found and held a promissory note does not have any value and is not a countable asset for Medicaid purposes and that on February 26, 2007, Director Hendrick issued a written letter stating the promissory note does not have any value and is therefore not a countable asset in determining Medicaid eligibility.

You asked that as a part of the decision, that the issue of resource availability as well as transfer be determined in the decision by the Appeals Committee. You relied on the promissory note not having any value and therefore, would not be considered a countable asset and further pointed out that according to federal law, 42 U.S.C. §1396P(c)(1)(A), that plaintiffs incur a transfer penalty when they transfer assets. However, there are exceptions to the transfer penalty being imposed on plaintiffs. One of the exceptions contained in 42 U.S.C. §1396P(c)(1)(i), provides a transfer of assets in exchange for a properly structured promissory note does not create a transfer penalty. You believe that the promissory note in question meets the requirements of both federal law and DHS policy and therefore, would not incur a transfer penalty.

You indicated that a decision should be found in your clients favor as on December 12, 2006, a hearing was conducted by the Appeals Unit on the same issue and a decision rendered by Ms. Wettstein, Hearing Officer and Attorney, that the promissory note states on its face that: (1) is executed pursuant to Section 6016(c) of the Deficit Reduction Act (42 U.S.C. §1396P(c)(1)(I); (2) is actuarially sound; (3) provides for equal payments during the term of the notes; and (4) provides cancellation upon the lender's death; therefore, not subject to Medicaid applicants transfer penalties.

However, this decision was overturned by Director Hendrick as he determined the Medicaid applicant incurred a transfer penalty in transferring assets in exchange for the valueless promissory note.

You asked that your clients be determined eligible for Medicaid as their countable resources do not exceed the Agency resource standard as the promissory note has no marketable value and that the clients did not transfer

resources without commensurate return as the promissory note meets the requirements of both federal law and DHS policy.

Based on the information presented in the hearing, the Appeals Committee has determined that as of March 18, 2008, Mr. & Mrs. McAlary were determined to be ineligible for medical assistance as their resources exceeded the Agency resource standard due to countable resources in excess of $2,000.00 based on a promissory note with a principle amount of $178,030.00.

You presented evidence at the time of the hearing that the promissory note had no marketable value as you offered the note for immediate sale at which time three lenders refused to purchase the note. The Appeals Committee finds that Ms. Elliott, as Power of Attorney, Settlor and Trustee for the McAlary Family Trust, transferred assets totaling $178,030.00 to the McAlary Trust on January 21, 2008, and in return, Ms. Elliott, as Trustee and Power of Attorney, provided a promissory note of repayment which met the requirements of OAC 317:35-5-41.8(b)(1), which indicates the rules regarding the treatment of funds used to purchase a promissory note loan on or after February 8, 2006, are found in 1 through 2 of this sub-section. Sub-section 1 indicates funds used to purchase a promissory note on or after February 8, 2006, are treated as assets transferred for less than fair market value and the amount of the outstanding balance due on the note, loan or mortgage as of the date of the individual's application for medical assistance, unless the note, loan or mortgage meets all the conditions in paragraph A through C of this paragraph.

> (A) The note loan or mortgage has a repayment term that is actuarially sound as determined in accordance with the actuarial publications of the

Office of the Chief Actuary of the United States Social Security Administration.

(B) The note, loan or mortgage provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made.

(C) The note, loan or mortgage prohibits the cancellation of the balance upon the death of the lender. This language is consistent with federal law under 42 U.S.C. §1396p(c)(1)(I)

However, the Appeals Committee finds that 317:35-5-41.8(b)(2) indicates that funds used to purchase a promissory note, loan or mortgage for less than it's [sic] fair market value are treated as assets transferred for less than fair market value regardless of whether: (A) the note, loan or mortgage was purchased before February 8, 2006; or (B) the note, loan or mortgage was purchased on or after February 8, 2006, and the conditions described in paragraph (1) of this subsection are met. Consequently, the Appeals Committee has determined that by adding the language "non-resource, non-collateral" to the promissory note, you went beyond the scope of policy thus creating a promissory note with no marketable value and no way for recoupment. As a result, this action constitutes a transfer without commensurate return in the amount of $178,030.00.

This decision is final unless you ask the Director of Human Services to review the decision. If you want the Director to review this decision, your written request for review must be received by OKDHS within thirty days of the date on this decision. The thirty days to appeal begins on the day after the date at the top of this letter, **not** on the day you receive

this letter. Your request for review should say why you disagree with this decision.

Sincerely,

/s/ Karen R. Logan

Karen R. Logan
Admin. Hearing Officer
Appeals Unit

KRL/gs
c: Dewey County 22C (01/03)
SO/FSSD/Jim Struby
Appeals
File

Dewey County DHS
Court House Basement
P.O. Box 128
Taloga, OK 73667

Office Code C
Phone # (580) 328-5546
800-433-6967

Dale G. McAlary
c/o Craig Riffel
Box 5557
Enid, OK 73702-5557

Date 03/25/2008
Case No. A105830
Dist. 03 Supvr. 01

Notice of Denial

Your state supplemental payment application has been denied for 03/5/2008 because: Your resources exceed the agency's resource standards. This action is in accordance with OAC 317: 35-5-41(1).

Our records show your resources are valued at $0 and the maximum resources your family of 1 adult can have and be eligible is $2000.

Your application has been denied for medical assistance, because: Your resources exceed the agency's resource standards. This action is in accordance with OAC 317: 35-5-41(1).

If you do not consider this decision a proper one, you or your authorized representative may request a hearing at the local office to appeal the decision. You have the right to legal counsel at the hearing. You may choose your own private attorney or information about where you can get free legal help is available on request from the local office. (Forms for requesting a fair hearing, assistance needed in completing the forms or preparing for a hearing are available from the local office or your lawyer) The period for requesting a hearing will begin with the day after the date of this notice.

Request for a hearing must be made within 30 days for medical assistance and state supplemental payment.

If you live outside the calling area of your local office, you may use the number listed above to report or obtain information.

If we can be of further assistance, please contact us at the above address or telephone number.

Dewey County DHS
Court House Basement
P.O. Box 128
Taloga, OK 73667

Office Code C
Phone # (580) 328-5546
800-433-6967

Dale G. McAlary
c/o Craig Riffel
Box 5557
Enid, OK 73702-5557

Date 03/24/2008
Case No. A105830
Dist. 03 Supvr. 01

Notice of Denial

Your application has been denied for medical assistance. Because: Your resources exceed the agency's resource standards. This action is in accordance with OAC 317: 35-5-41(f).

If you do not consider this decision a proper one, you or your authorized representative may request a hearing at the local office to appeal the decision. You have the right to legal counsel at the hearing. You may choose your own private attorney or information about where you can get free legal help is available on request from the local office. (Forms for requesting a fair hearing, assistance needed in completing the forms or preparing for a hearing are available from the local office or your lawyer). The period for requesting a hearing will begin with the day after the date of this notice.

Any request for a hearing must be made within 30 days for medical assistance and state supplemental payment.

If you live outside the calling area of your local office, you may use the number listed above to report or obtain information.

If we can be of further assistance, please contact us at the above address or telephone number.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES

Charles Lee Waters, General Counsel
Office of General Counsel
P.O. Box 53025
Oklahoma City, OK 73152-3025
(405)521-3628 – Fax (405) 521-6816

March 18, 2008

Craig Riffel
Mitchel, Gaston, Riffel & Riffel
P.O. Box 5557
Enid, OK 73702

NOTICE OF DENIAL

re:	Dale McAlary	Pearl McAlary
	A105830	A105831

Dear Mr. Riffel:

Please accept this letter as the notice of denial of Dale and Pearl McAlary's Medicaid applications filed January 22, 2008. I am sending this notice, instead of the local OKDHS office, because Dale and Pearl McAlary appear to be members of the proposed class in Schnoebelen v. OKDHS, *et al.*, Woodward County Case Number CJ-2008-7.

Denial is based on Dale and Pearl McAlary having countable resources in excess of $2,000 on the date of application and for the 90 days preceding. See OAC 317:35-19-21 (LTC) or OAC 317:35-17-11 (ADvantage).

The following facts were used in making the determination to deny this application, most of which relate to the Non-Recourse Non-Collateralized Promissory Note:

> Date of entry into Long-Term care (LTC): January 2, 2008
> Application Date: January 22, 2008
> Date Note Executed: January 21, 2008
> Principal Amount: $178,030.00
> Value of Note on date of application: $178,030.00
> Total Countable Resources on date of application: $178,030.00

Based on the information available to OKDHS at this time, Dale and Pearl McAlary have been ineligible for Medicaid since the third month preceding the date of application because they had countable resources greater than $2,000.

If Dale or Pearl McAlary disagree with this action, they may file an appeal by providing OKDHS a written request for a fair hearing within 30 days of the date on this letter. If a fair hearing is requested, please send it to me and indicate whether you want to set the case for hearing or held pending resolution of class litigation.

Please let me know if you have any questions.

Sincerely,
/s/ Travis Smith
Travis Smith
Assistant General Counsel
cc: Gerry Moore – Dewey County OKDHS